

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

EDDIE GARCIA,

Plaintiff,

vs.

Civil Action No.:

1:21-cv-06393-EAW-MWP

LEWIS TREE SERVICE, INC. and  
ROBERT GASTON,

Defendants.

---

**DECLARATION OF JESSICA C. MOLLER IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR LEAVE TO AMEND**

JESSICA C. MOLLER, ESQ., declares the following under penalty of perjury:

1. I am an attorney at law duly admitted to practice in the United States District Court for the Western District of New York, and am a member of the law firm Bond, Schoeneck & King, PLLC, attorneys for Lewis Tree Service, Inc. ("Lewis Tree"), the only defendant remaining in this action.<sup>1</sup> As such, I am fully familiar with the facts and circumstances set forth herein.

2. This Declaration is submitted in opposition to Plaintiff's motion for leave to amend the complaint, filed on June 3, 2022. (Dkt. 32).

3. On March 10, 2022, this Court granted in part and denied in part the motion to dismiss that was filed by Lewis Tree and then-Defendant Robert Gaston. (*See* Dkt. 21). The motion was denied only to the limited extent that dismissal of Plaintiff's Americans with Disabilities (ADA) failure-to-accommodate claim against Lewis Tree, and was granted in all

---

<sup>1</sup> All claims against Defendant Robert Gaston were dismissed by Order of this Court dated March 10, 2022 (Dkt. 21).

other respects. In that decision, this Court also denied without prejudice Plaintiff's "cursory request for leave to amend in the event any of his claims [were] dismissed" (Dkt. 21 at p. 21), and instructed Plaintiff that "if Plaintiff believes in good faith that his claims can be amended to address the deficiencies identified" in the Court decision, that Plaintiff would be permitted to file "a procedurally compliant motion for leave to amend." (*Id.*)

4. On April 20, 2022, counsel for both parties submitted an agreed-upon joint Proposed Discovery Plan. (*See* Dkt. 27). The Proposed Joint Discovery Plan contained a deadline of May 6, 2022 for the parties to file motions to join other parties and amend the pleadings.

5. The following week, on April 27, 2022, Hon. Mark W. Pedersen, United States Magistrate Judge, conducted a telephonic FRCP Rule 16 conference. I participated in that conference on behalf of Lewis Tree, and Jonathan Shalom, Esq. participated in that conference on behalf of Plaintiff. At the Rule 16 conference, Mr. Shalom did not raise any issue with the May 6<sup>th</sup> deadline for motions to join other parties and to amend the pleadings, or otherwise indicate that Plaintiff would have any difficulty meeting that deadline.

6. Following the Rule 16 conference, on April 27, 2022, Judge Pedersen issued a Scheduling Order containing the agreed-upon May 6<sup>th</sup> deadline to file motions to join other parties and amend the pleadings. (*See* Dkt. 28).

7. On the morning of May 4, 2022, Mr. Shalom sent me an email seeking consent for a three-week extension of the deadline to serve initial disclosures and amend the pleadings. A copy of the email is attached hereto as **Exhibit 1**. As the basis for his request, Mr. Shalom wrote: "Due to current calendar obligations this week, I am unable to meet the 5/6/2022 deadline to Join Parties/Amend Pleadings and provide Initial Disclosures." (*Id.*).

8. Shortly thereafter of May 4, 2022, I responded to Mr. Shalom's email. In my email to Mr. Shalom, a copy of which is attached hereto as **Exhibit 2**, I informed Mr. Shalom that while I ordinarily consent to reasonable requests for extensions and could consent to his request with respect to the service of initial disclosures, absent an emergency, I could not consent to his request as relates to motions to join additional parties or to amend the pleadings. (*Id.*). I specifically noted that Plaintiff had been on notice of the need to file a proper motion to amend since this Court issued its Decision & Order on Defendants' motion to dismiss on March 10, 2022. (*Id.*). I further noted that the parties had agreed to the May 6<sup>th</sup> deadline in the joint proposed discovery plan that was submitted to the Court, and that Mr. Shalom should have, but did not, raise any concerns about meeting that deadline during the April 27<sup>th</sup> Rule 16 conference. (*Id.*).

9. I did not receive any response from Mr. Shalom before he filed his May 4<sup>th</sup> letter motion to the Court seeking a thirty-day extension of the May 6<sup>th</sup> deadline to join additional parties and amend the pleadings. (*See* Dkt. 30).

10. On May 18, 2022, Nathan A. Jones, Law Clerk to the Hon. Mark Pedersen, informed counsel by email that Judge Pedersen would not grant Plaintiff's request to modify the deadlines in the Scheduling Order, and any motion to amend the pleadings under Rule 16(b)(4) must be filed by June 3, 2022. A copy of this email is attached hereto as **Exhibit 3**.

11. For the reasons set forth in Lewis Tree's Memorandum of Law in Opposition to Plaintiff's Motion for Leave to Amend and the Affidavit of Christopher R. Gaston, sworn to June 10, 2022, Plaintiff's motion should be denied in its entirety.

Dated: June 17, 2022



---

JESSICA C. MOLLER

# **EXHIBIT 1**

**Moller, Jessica**

---

**From:** Jonathan Shalom <Jonathan@shalomlawny.com>  
**Sent:** Wednesday, May 04, 2022 9:58 AM  
**To:** Moller, Jessica  
**Subject:** Fw: Activity in Case 6:21-cv-06393-EAW-MJP Garcia v. Lewis Tree Service, Inc. et al

**External Email:** Use caution before clicking links or opening attachments.

Counsel,

Due to current calendar obligations this week, I am unable to meet the 5/6/2022 deadline to Join Parties/Amend Pleadings and provide Initial Disclosures. May I have your consent for a three week extension up and until 5/27/2022? If so, I file with a letter motion with the court.

Thank you.



**Jonathan Shalom**  
**Managing Partner**



(718) 971-9474



[Jonathan@shalomlawny.com](mailto:Jonathan@shalomlawny.com)

105-13 Metropolitan Avenue Forest Hills New York 11375

CONFIDENTIALITY NOTICE: This message is being sent by or on behalf of a lawyer. It is intended exclusively for the individual or entity to which it is addressed and it may contain information that is confidential, privileged, proprietary or otherwise exempt from disclosure under applicable law. If you are not the intended recipient, you are prohibited from copying, disclosing, distributing, disseminating or otherwise using this transmission in any way. If you have received this transmission in error, please immediately notify the sender and delete this transmission and all its attachments from your computer. Thank you.

---

**From:** webmaster@nywd.uscourts.gov <webmaster@nywd.uscourts.gov>  
**Sent:** Wednesday, April 27, 2022 3:47 PM  
**To:** Courtmail@nywd.uscourts.gov <Courtmail@nywd.uscourts.gov>  
**Subject:** Activity in Case 6:21-cv-06393-EAW-MJP Garcia v. Lewis Tree Service, Inc. et al

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

**U.S. DISTRICT COURT**  
**U.S. District Court, Western District of New York**

## **Notice of Electronic Filing**

The following transaction was entered on 4/27/2022 at 3:47 PM EDT and filed on 4/27/2022

**Case Name:** Garcia v. Lewis Tree Service, Inc. et al

Case Number: [6:21-cv-06393-EAW-MJP](#)

Filer:

Document Number: [28](#)

Docket Text:

**SCHEDULING/CASE MANAGEMENT ORDER (Please Note: This docket text may not contain the entire contents of the attached Order. It is your responsibility to read the attached Order and download it for future reference. Direct any questions to the Chambers of the Judge who entered this Order.)** Motions to Join Parties/Amend Pleadings due by 5/6/2022. Mandatory Disclosures due by 5/6/2022. Stipulation of Selection of Mediator due by 5/25/2022. First Mediation Session due by 7/20/2022. Motions to Compel Discovery due by 10/31/2022. Discovery completed by 11/30/2022. Plaintiff Expert Witness ID due by 1/3/2023. Defendant Expert Witness ID due by 2/3/2023. Dispositive Motions due by 5/1/2023.. Signed by Hon. Mark W. Pedersen on 4/27/22. (KAP)

**6:21-cv-06393-EAW-MJP Notice has been electronically mailed to:**

Peter H. Wiltenburg   pwiltenburg@bsk.com, HoveyT@bsk.com

Jonathan Shalom   Jonathan@Shalomlawny.com, Jonathan.shalom25@gmail.com

Jessica Moller   jmoller@bsk.com

**6:21-cv-06393-EAW-MJP Notice has been delivered by other means to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1042579058 [Date=4/27/2022] [FileNumber=5140114-0  
] [4baf272f92782a30d444ad2400895035ec618d63c9bd400d7322edbcdf95f129b66  
6b8efb28654d6c77ec46166bf62994b72cdeb8c1a0115b4d1b68351485e90]]

# **EXHIBIT 2**

## Moller, Jessica

---

**From:** Moller, Jessica  
**Sent:** Wednesday, May 04, 2022 11:49 AM  
**To:** Jonathan Shalom  
**Cc:** Wiltenburg, Peter  
**Subject:** RE: Activity in Case 6:21-cv-06393-EAW-MJP Garcia v. Lewis Tree Service, Inc. et al

Jonathan,

I do ordinarily consent to reasonable requests for extensions, and we can consent to an extension to 5/27 for the Initial Disclosures. However, we cannot consent to an extension of the deadline for amending the pleadings or joining parties. You have been on notice of the need to file a proper motion to amend since Judge Wolford's decision was issued on 3/10, and the 5/6 deadline for amending pleadings and joining additional parties was just recently submitted to the court as a mutually agreed upon date by all parties and was discussed and again agreed to you and I during our Rule 16 conference with Magistrate Pederson last week – if you had concerns about your ability to meet the 5/6 deadline, it should have been raised at that time. Absent a legitimate emergency that has only just arisen, we are unable to consent to your extension request and will submit an appropriate objection to the court in response to your request if one is filed.

Jessica

**Jessica C. Moller, Esq.**

Direct: 516.267.6332 / 646.253.2335

Cell: 518.727.6128

---

**From:** Jonathan Shalom <Jonathan@shalomlawny.com>  
**Sent:** Wednesday, May 04, 2022 9:58 AM  
**To:** Moller, Jessica <mollerj@bsk.com>  
**Subject:** Fw: Activity in Case 6:21-cv-06393-EAW-MJP Garcia v. Lewis Tree Service, Inc. et al

**External Email:** Use caution before clicking links or opening attachments.

Counsel,

Due to current calendar obligations this week, I am unable to meet the 5/6/2022 deadline to Join Parties/Amend Pleadings and provide Initial Disclosures. May I have your consent for a three week extension up and until 5/27/2022? If so, I file with a letter motion with the court.

Thank you.



**Jonathan Shalom**  
**Managing Partner**



(718) 971-9474



[Jonathan@shalomlawny.com](mailto:Jonathan@shalomlawny.com)

105-13 Metropolitan Avenue Forest Hills New York 11375



CONFIDENTIALITY NOTICE: This message is being sent by or on behalf of a lawyer. It is intended exclusively for the individual or entity to which it is addressed and it may contain information that is confidential, privileged, proprietary or otherwise exempt from disclosure under applicable law. If you are not the intended recipient, you are prohibited from copying, disclosing, distributing, disseminating or otherwise using this transmission in any way. If you have received this transmission in error, please immediately notify the sender and delete this transmission and all its attachments from your computer. Thank you.

---

**From:** [webmaster@nywd.uscourts.gov](mailto:webmaster@nywd.uscourts.gov) <[webmaster@nywd.uscourts.gov](mailto:webmaster@nywd.uscourts.gov)>  
**Sent:** Wednesday, April 27, 2022 3:47 PM  
**To:** [Courtmail@nywd.uscourts.gov](mailto:Courtmail@nywd.uscourts.gov) <[Courtmail@nywd.uscourts.gov](mailto:Courtmail@nywd.uscourts.gov)>  
**Subject:** Activity in Case 6:21-cv-06393-EAW-MJP Garcia v. Lewis Tree Service, Inc. et al

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

**U.S. DISTRICT COURT**

**U.S. District Court, Western District of New York**

**Notice of Electronic Filing**

The following transaction was entered on 4/27/2022 at 3:47 PM EDT and filed on 4/27/2022

**Case Name:** Garcia v. Lewis Tree Service, Inc. et al

**Case Number:** [6:21-cv-06393-EAW-MJP](#)

**Filer:**

**Document Number:** [28](#)

**Docket Text:**

**SCHEDULING/CASE MANAGEMENT ORDER (Please Note: This docket text may not contain the entire contents of the attached Order. It is your responsibility to read the attached Order and download it for future reference. Direct any questions to the Chambers of the Judge who entered this Order.)** Motions to Join Parties/Amend Pleadings due by 5/6/2022. Mandatory Disclosures due by 5/6/2022. Stipulation of Selection of Mediator due by 5/25/2022. First Mediation Session due by 7/20/2022. Motions to Compel Discovery due by 10/31/2022. Discovery completed by 11/30/2022. Plaintiff Expert Witness ID due by 1/3/2023. Defendant Expert Witness ID due by 2/3/2023. Dispositive Motions due by 5/1/2023.. Signed by Hon. Mark W. Pedersen on 4/27/22. (KAP)

6:21-cv-06393-EAW-MJP Notice has been electronically mailed to:

Peter H. Wiltenburg [pwiltensburg@bsk.com](mailto:pwiltensburg@bsk.com), [HoveyT@bsk.com](mailto:HoveyT@bsk.com)

Jonathan Shalom [Jonathan@Shalomlawny.com](mailto:Jonathan@Shalomlawny.com), [Jonathan.shalom25@gmail.com](mailto:Jonathan.shalom25@gmail.com)

Jessica Moller [jmoller@bsk.com](mailto:jmoller@bsk.com)

**6:21-cv-06393-EAW-MJP Notice has been delivered by other means to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1042579058 [Date=4/27/2022] [FileNumber=5140114-0  
] [4baf272f92782a30d444ad2400895035ec618d63c9bd400d7322edbcdf95f129b66  
6b8efb28654d6c77ec46166bf62994b72cdeb8c1a0115b4d1b68351485e90]]

# **EXHIBIT 3**

**Moller, Jessica**

---

**From:** Nathan Jones <Nathan\_Jones@nywd.uscourts.gov>  
**Sent:** Wednesday, May 18, 2022 1:57 PM  
**To:** Jonathan@Shalomlawny.com; Moller, Jessica; Wiltenburg, Peter  
**Subject:** RE: 21-CV-6393 Garcia v. Lewis Tree Service

**External Email:** Use caution before clicking links or opening attachments.

Dear Counselors:

After reading the filings by both parties, the Judge is not inclined to grant a motion to extend time to amend. The Judge invites formal motion practice at this time, under Rule 16 (b)(4). The motion shall be filed on or before June 3, 2022, and opposition on or before June 17, 2022.



**Nathan A Jones**  
*Law Clerk to the Hon. Mark Pedersen*

*Western District of New York*  
Kenneth B. Keating Federal Building  
100 State Street, Rochester, NY 14614  
O: 585-613-4362  
[www.nywd.uscourts.gov](http://www.nywd.uscourts.gov)